

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT
OF FISHERIES,

Appellant,

v.

MASON COUNTY,

Respondent, and

NORTHBAY PROPERTY OWNERS,
ASSOCIATION,

Intervenor-Respondent.

SHB No. 88-26

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
AFFIRMANCE OF MASON COUNTY

This is an appeal from Mason County's denial of the State of Washington Department of Fisheries' ("DOF") application for a shoreline substantial development permit to place gravel on oyster reserve tidelands in North Bay, Case Inlet in Puget Sound, to enhance hardshell clam habitat.

The hearing was held on February 7-8, 1989, in Lacey, Washington, and on March 1 and April 3, 1989 in Belfair. These proceedings

1 concluded on April 24, 1989 with the filing of closing argument. A
2 site visit with the parties was held on March 1. Board members
3 participating in this proceeding were: Judith A. Bendor (Presiding),
4 Wick Dufford (Chairman), Harold S. Zimmerman, Nancy Burnett, Paul Cyr,
5 and Gordon F. Crandall. Appellant DOF was represented by Assistant
6 Attorney General Terese Neu Richmond. Respondent Mason County was
7 represented by Deputy Prosecuting Attorney Michael Clift.
8 Intervenor-respondent Northbay Property Owners Association ("Northbay
9 Assoc.") was represented by Attorney Dennis P. Reynolds of Mitchell,
10 Lang and Smith (Seattle). Court reporters with Gene S. Barker
11 recorded the proceedings. Testimony was heard and a deposition
12 admitted by stipulation was reviewed. Exhibits were admitted and
13 reviewed. Counsel's contentions were heard and read. From the
14 foregoing the Shorelines Hearings Board makes these

15 FINDINGS OF FACT

16 I

17 On December 17, 1986 the Department of Fisheries ("DOF")
18 submitted an application for a shoreline substantial development
19 permit to Mason County to spread from one to eight inches of pit-run
20 gravel on an undetermined number of acres on the Washington Department
21 of Fisheries Oyster Reserve (Tract #1, North Bay Case Inlet).

22 II

23 The gravel, 80% of which is to be 0.25 to 0.75 inch in size, will
24

25 FINAL FINDINGS OF FACT AND
26 CONCLUSIONS OF LAW - AFFIRMING
27 SHB NO. 88-26

1 be spread through the intertidal zone with a range of +6 feet to -2
2 feet/MILLW (Mean Lower Low Water), with the majority being two to four
3 inches in depth and occurring between 0 and +6 feet.

4 III

5 The tract is described as a "broad, sandy, mostly firm tideflat
6 with gravel patches in the upper beach levels. The northern one third
7 of the tract becomes increasingly soft mud."

8 IV

9 On December 31, 1986, applicant DOF filed its Declaration of
10 Non-Significance ("DNS") for the proposal under WAC 197-11-340(2).
11 The DOF is a public agency. Other agencies with jurisdiction over the
12 proposal were given 15 days to comment on the DNS or to assume lead
13 agency status. Mason County responded to the DNS with comments and
14 suggested mitigation measures on January 13, 1987, but did not assume
15 lead agency status.

16 V

17 The shoreline permit was considered by Mason County Board of
18 Commissioners at a public hearing on March 3, 1987, at which Richard
19 Burge of the Department of Fisheries explained that originally they
20 applied for an area within 158 acres to be sure to select the proper
21 site, and that they were requesting permission to gravel one acre the
22 first year.

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VI

On June 9, 1987 the Mason County Commissioners were informed that the DOF had requested a continuation of the hearing scheduled for June 16, 1987, because data from a programmatic EIS which pertains statewide to beach enhancement for clam habitat, would be available soon. On October 6, 1987, the DOF requested a three-month extension of time for the hearing on Case Inlet which was scheduled to be October 20, 1987. On January 12, the Commissioners received a letter from DOF, requesting a continuation of the January 19, 1988 hearing on the substantial development permit, because the Final EIS was then expected by May, 1988.

VII

Finally, on May 17, 1988, after a hearing and in consideration of the completed programmatic EIS, the commissioners denied the application, citing concern for the Olympia oyster reserve, tribal problems, parking, traffic flow, access across private tidelands, enforcement, commercial usage vs. recreational use.

VIII

DOF appealed the denial to the Shoreline Hearings Board ("SHB") which became our appeal SHB No. 88-26.

On January 17, 1989, the SHB announced its ruling on DOF's motion for partial summary judgment, deleting the State Environmental Policy Act ("SEPA") legal issues from the case. On January 30, 1989 Northbay Assoc. was granted intervenor-respondent party status on the

FINAL FINDINGS OF FACT AND
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1 condition that no new legal issues be added. Written orders
2 confirming these rulings were issued.

3 IX

4 North Bay is in the northern most part of Case Inlet which is in
5 south Puget Sound. The Bay is about three miles long, aligned north
6 to south, and 2500 to 3000 feet wide east-west. The Bay has a very
7 flat bottom gradient, 1% to 2% slope. At low tides, tidelands along
8 the eastern shore are exposed at the proposed site and both north and
9 south of it.

10 X

11 A small stream, Coulter Creek, enters the Bay 2 1/4 of a mile
12 north of the site. The site itself is not within an estuary.

13 Migratory waterfowl and other birds inhabit the Bay. Juvenile
14 salmon frequent the area. The eelgrass beds that exist in the area
15 near the site are sparse.

16 XI

17 Over the past 100 years oysters have been actively cultivated in
18 the Bay. There are some commercial operations ongoing. Remnants of
19 old oyster dikes can be seen within the Reserve. In Mason County,
20 shellfish operators routinely gravel the tidelands to enhance
21 production, typically doing so as part of ongoing maintenance, and
22 without obtaining shoreline permits.

23 In 1891 the Legislature established Oyster Reserves in the
24

1 State. Laws of Wash. 1891, pp. 366-7. The North Bay 150-acre Reserve
2 was one of these. Sale or lease of these Reserves was not allowed.
3 In 1949 the Legislature broadened the Reserves' goals to include the
4 cultivating and managing of other shellfish. In 1969 the public was
5 explicitly allowed to harvest the Reserves' shellfish. Ch. 91, Laws
6 of 1969 (1st Ex. Sess.). Most recently, the Legislature directed that
7 oyster reserve management plans be developed which include
8 recreational harvesting zones. Ch. 256, Laws of Washington 1985. The
9 Legislature instructed that the reserves be managed to maximize
10 shellfish sustained yield production.

11 XII

12 The public most likely to use this Oyster Reserve includes the
13 general public and members of Indian tribes. Non-tribal recreational
14 harvesters take up to 40 clams per day, about two to three pounds.
15 Tribal harvesters might average up to 200 pounds daily during a brief,
16 intense harvesting period. The Tribes harvest shellfish for
17 subsistence food, for ceremonial religious purposes, and for later
18 sale.

19 The most active Tribe closest to the site is the Squaxin. They
20 have historically accessed this area by boat. However other tribes,
21 such as the Skokomish have been known to harvest at the site, coming
22 overland to do so.

XIII

As finally proposed at hearing, the enhancement project would ultimately involve five acres, if the one acre test plot were successful. The gravel added in the intertidal area would be subject to littoral drift. We were not convinced that it would, more likely than not, remain in place at the location proposed.

XIV

Adjoining land at the Case Inlet site is primarily in private ownership and there is a lack of public parking and sanitation facilities for members of the public who would be drawn to the site if the project were successful. DOF plans to limit the site to boat access only. This limitation would, we find, be as likely honored in the breach as in the observance. Without adequate land access to the beach for the public, there are likely to be trespass problems, traffic congestion on a narrow highway, and potential pollution problems.

XV

This project involves a central contradiction; no planning for land access or parking, yet a purpose to promote increased public usage of the site.

XVI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

1 CONCLUSIONS OF LAW¹

2 I

3 The Shorelines Hearings Board has jurisdiction over the parties
4 and the subject matter of the appeal. RCW 90.58.180.

5 The Board does not have jurisdiction over Indian treaty rights.
6 (Friends of the Earth v. Navy, SHB Nos. 87-31 and 33; Order Granting
7 Partial Summary Judgment.)

8 Appellant has the burden of proving that the proposed development
9 is consistent with the criteria that must be met before a permit is
10 granted. RCW 90.58.140(7).

11 II

12 The Shorelines Hearings Board reviews this proposed development
13 for consistency with the Shorelines Management Act (Chapt. 90.58 RCW;
14 "SMA"), and the Mason County Shorelines Master Program ("MCSMP"). RCW
15 90.58.140(2).

16 III

17 The Shoreline Management Act of 1971, RCW 90.58.020, enunciates
18 policy, stating in part:

19 "The legislature further finds that much of the
20 shorelines of the state and uplands adjacent thereto
21 are in private ownership; that unrestricted
22 construction on the privately owned or publicly
23 owned shorelines of the state is not in the best

24 ¹ Neither of the SHB Opinions is entitled to precedential legal
25 effect, as neither has garnered a majority of Board. WEC v. Douglas
26 County, SHB No. 86-34, at fn. 2.

1 public interest; and therefore, coordinated planning is necessary
2 in order to protect the public interest associated with the
3 shorelines of the state while, at the same time, recognizing and
4 protecting private property rights consistent with the public
5 interest."

6 The Board concludes that DOF's plans did not reflect the coordinated
7 planning required by the Act, necessitating that clam enhancement
8 projects to maximize recreational and tribal use be so located as to
9 avoid impacting citizens of any one area.

10 IV

11 RCW 90.58.020 also states:

12 "This policy contemplates protecting against adverse
13 effects to the public health, the land and its
14 vegetation and wildlife and the waters of the state
15 and their aquatic life . . . "

16 The Board concludes that the DOF proposal is inconsistent with
17 the policy of protecting public health, and preventing pollution of
18 waters, in its absence of adequate provisions for public parking,
19 sanitation facilities and public access to the beach.

20 V

21 The Board further concludes that the likelihood of the drifting
22 of gravel off-site is inconsistent with RCW 90.58.020's preference for
23 prevention of damage to the natural environment.

24 VI

25 The DOF proposal also is inconsistent with the Mason County

1 Shoreline Master Program (MCSMP). Section 7.16.020 provides in part:

2 1. Shoreline developments adjacent to unique
3 areas especially suitable for aquaculture shall
4 practice strict pollution control procedures to
5 ensure aquaculture capabilities.

6 Case Inlet in the area proposed for graveling is suitable for
7 aquaculture (artificial clam enhancement) only if adequate provisions
8 are made to prevent the public from despoiling the beach. The
9 proposal at hand, with no public lavatory facilities nearby, does not
10 adequately deal with this problem.

11 VII

12 The Board concludes that the DOF proposal is likewise
13 inconsistent with the Section 7.16.220, which states in part:

14 "1. Shoreline developments that serve the variety of
15 recreational needs of people living in nearby
16 population centers should be encouraged."

17 "2. All proposed recreational developments shall be
18 analyzed for their potential effect on environmental
19 quality and natural resources."

20 "3. Recreational developments should be designed in
21 such a way as to protect the quality of scenic views
22 and the environment."

23 "4. Parking areas should be located inland where
24 feasible, away from the immediate water's edge, and
25 linked to the shorelines by trails or walkways."

26 The Board concludes that this proposed project of DOF was not
27 planned and analyzed in a manner consistent with these four

1 subsections. In particular, with no parking provided, it not only
2 fails sub-paragraph 4, but compounds the problem of attempting
3 limitation to boat access only.

4 VIII

5 Any Finding of Fact deemed to be a Conclusions of Law is hereby
6 adopted as such.

ORDER

The Mason Commissioners' action in denying DOF's permit is affirmed.

DONE this 15th day of August, 1989.

SHORELINES HEARINGS BOARD

[See other Opinion]

JUDITH A. BENDOR, Presiding

[See other Opinion]

WICK DUFFORD, Member

Nancy Burnett
NANCY BURNETT, Member

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

[See Other Opinion]

GORDON F. CRANDALL, Member

Paul Cyr
PAUL CYR, Member *by 2/83.*

FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW - AFFIRMING
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(12)

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

State of Washington, DEPARTMENT
OF FISHERIES,

Appellant,

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MASON COUNTY,

Respondent, and

NORTHBAY PROPERTY OWNERS,
ASSOCIATION,

Intervenor-Respondent.

SHB No. 88-26

FINAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW -
REVERSAL

This is an appeal from Mason County's denial of the State of Washington Department of Fisheries' ("DOF") application for a shoreline substantial development permit to place gravel on five acres of state Oyster Reserve tidelands in North Bay, Case Inlet in Puget Sound, to enhance hardshell clam habitat.

The hearing was held on February 7-8, 1989, in Lacey, Washington,

1 and on March 1 and April 3, 1989 in Belfair. These proceedings
2 concluded on April 24, 1989 with the filing of closing argument. A
3 site visit with the parties was held on March 1. Board members
4 participating in this proceeding were: Judith A. Bendor (Presiding),
5 Wick Dufford (Chairman), Harold S. Zimmerman, Nancy Burnett, Paul Cyr,
6 and Gordon F. Crandall. Appellant DOF was represented by Assistant
7 Attorney General Terese Neu Richmond. Respondent Mason County was
8 represented by Deputy Prosecuting Attorney Michael Clift.
9 Intervenor-respondent Northbay Property Owners Association ("Northbay
10 Assoc.") was represented by Attorney Dennis P. Reynolds of Mitchell,
11 Lang and Smith (Seattle). Court reporters with Gene S. Barker
12 recorded the proceedings. Testimony was heard and a deposition
13 admitted by stipulation was reviewed. Exhibits were admitted and
14 reviewed. Counsel's contentions were heard and read. From the
15 foregoing the Shorelines Hearings Board makes these

16 FINDINGS OF FACT

17 I

18 On December 17, 1986 the Department of Fisheries ("DOF")
19 submitted an application for a shoreline substantial development
20 permit to Mason County to apply up to eight inches of gravel on 5
21 acres of tidelands in the State Oyster Reserve (Tract 1 in North Bay,
22 Case Inlet). The purpose is to enhance clam production.

23 On December 31, 1986 Applicant DOF filed its Determination of
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26 FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW - REVERSAL

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1 Non-Significance ("DNS") for the proposal under WAC 197-11-340(2).
2 The DOF is a public agency. Other agencies with jurisdiction over the
3 proposal were given 15 days to comment on the DNS or to assume lead
4 agency status. Mason County responded to the DNS with comments and
5 suggested mitigation measures on January 13, 1987, but neither assumed
6 lead agency status nor requested a site-specific Environmental Impact
7 Statement ("EIS").

8 A Programmatic EIS for Hardshell Clam Habitat Enhancement for all
9 of Puget Sound was prepared by DOF and issued in May 1988.

10 II

11 The shoreline permit application was considered by Mason County
12 Board of Commissioners at public hearings on March 3, 1987 and on May
13 17, 1988. On May 17, 1988 the Commissioners denied the application.
14 DOF appealed the denial to the Shoreline Hearings Board ("SHB") which
15 became our appeal SHB No. 88-26.

16 On January 17, 1989, after motions practice, the SHB announced
17 its ruling granting DOF partial summary judgment deleting the State
18 Environmental Policy Act ("SEPA") legal issues. On January 30, 1989,
19 Northbay Assoc. was granted intervenor-respondent party status on the
20 condition that no new legal issues be added. Written orders
21 confirming these rulings were issued.

22 III

23 North Bay is in the northern most part of Case Inlet which is in
24 south Puget Sound. The Bay is about three miles long, aligned north
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26 FINAL FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW - REVERSAL

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1 to south, and 2500 to 3000 feet wide east-west. The Bay has a very
2 flat bottom gradient, 1% to 2% slope. At low tides, tidelands along
3 the eastern shore are exposed at the proposed site and both north and
4 south of it. The tidelands consist mostly of fine sand, with some
5 mud. The higher elevations consist of fine to coarse gravel.

6 A small stream, Coulter Creek, enters the Bay 2 1/4 of a mile
7 north of the site. The site itself is not within an estuary.

8 Migratory waterfowl and other birds inhabit the Bay. Juvenile
9 salmon frequent the area. The eelgrass beds that exist in the area
10 near the site are sparse. None exists within the site itself.

11 IV

12 Over the past 100 years oysters have been actively cultivated in
13 the Bay. There are some ongoing commercial operations. Remnants of
14 old oyster dikes can be seen within the Reserve. In Mason County,
15 shellfish operators routinely gravel the tidelands to enhance
16 productions, typically doing so as part of ongoing maintenance, and
17 without obtaining shoreline permits.

18 In 1891 the Legislature established Oyster Reserves in the
19 State. Laws of Wash. 1891, pp. 366-7. The North Bay 150-acre Reserve
20 was one of these. Sale or lease of these Reserves was not allowed.
21 In 1949 the Legislature broadened the Reserves' goals to include the
22 cultivating and managing of other shellfish. In 1969 the public was
23 explicitly allowed to harvest the Reserves' shellfish. Ch. 91, Laws
24 of 1969 (1st Ex. Sess.). Most recently, the Legislature directed that
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1 oyster reserve management plans be developed. The plans are to
2 include recreational harvesting zones. Ch. 256, Laws of Washington
3 1985. The Legislature instructed that the reserves be managed to
4 maximize shellfish sustained yield production.

5 IV

6 There is a vast and increasing demand for public areas in Puget
7 Sound where shellfish can be harvested. Pollution has led to the
8 closing of some public areas. The number and size of public tidelands
9 suitable for shellfish enhancement is limited. North Bay is one of
10 these few areas.

11 Clearly the public's interest in and practical ability to harvest
12 shellfish is of statewide concern. However, because of the existence
13 of private residential development along the shore and the lack of
14 parking, DOF proposes to limit public access to these shellfish beds
15 to boat access only.

16 V

17 The graveling would be done in phases, first applied to a one
18 acre test plot (100 by 400 feet) within the five acres, which would be
19 monitored for one year. Gravel would be placed at elevations of -1.8
20 feet to +3.8 feet MLLW (Mean Lower Low Water),¹ adjacent to the old
21

22 ¹ The application originally had the graveling at -2 feet MLLW to
23 +6.0 feet MLLW. DOF's consultant recommended the change in elevations
24 to minimize possible gravel transport.

1 oyster dikes. Gravel is there now, likely due to the past oyster
2 operations. Any sediment ("fines") in the enhancement gravel would
3 settle out rapidly. Only if the test plot showed success would the
4 project continue to the full 5 acres.

5 Gravel would be barged to the site at high tide during the
6 daytime. Two inch layers would be applied at three month intervals,
7 for a maximum of eight inches total. Sorted, screened gravel 1/4 to
8 3/4 inches in size would be used. (Washed gravel might be used.) 270
9 to 800 cubic yards total of gravel would be applied per acre. There
10 would not be any gravel placement from May 15 to June 15, during
11 salmon migration season. Some of the gravel would contain crushed
12 shells. Anchor rocks might be placed around part of the perimeter
13 should it be necessary to prevent gravel migration.

14 Within the Bay there is some littoral transport of sediment from
15 south to north along the eastern shore, primarily in the areas covered
16 during high tide above +3.8 feet MLLW, in a band 100 to 200 feet
17 wide. It is in this zone that the waves have the highest energy for
18 transporting sediments. It is not likely that significant amounts of
19 gravel from the site (which is below this transport zone) will be
20 transported off-site. Any transport will be further minimized by
21 anchor rocks if necessary. The habitat will change, favoring
22 organisms which prefer a gravel substrate.

23 There is little likelihood of adverse environmental effects from
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25

1 this project.

2 VI

3 The area was chosen for graveling due to its availability and
4 favorable conditions in terms of current, substrate, and the existence
5 of clams to naturally seed the area. It is more likely than not that
6 the project at this site will succeed, yielding 5,000 to 20,000 pounds
7 of legal-size clams (greater than 1 1/2") per acre per year (5 to 8
8 clams per square foot). The target species for this area is the
9 Little Neck (Manila) clam, which is valued both recreationally and
10 commercially. No artificial seeding of clams is proposed.

11 If the project were not productive, this would be detected during
12 the one-acre test phase. There would not be significant adverse
13 impacts if the project did not succeed and further graveling did not
14 occur.

15 VII

16 The public most likely to use this Oyster Reserve is the general
17 public including members of Indian tribes. Non-tribal recreational
18 harvesters take up to 40 clams per day, about two to three pounds.
19 This harvesting can occur over many months. Tribal harvesters might
20 average up to 200 pounds daily during a very brief, intense harvesting
21 period. The tribes harvest shellfish for subsistence food, for
22 ceremonial religious purposes, and for sale. There is no evidence
23 that any sales whatsoever would occur at the site.

The most active Indian tribe near the site is the Squaxin Island Tribe. They have historically accessed this area by boat. The Tribe has a thorough fisheries management program, including fisheries biologists and enforcement officers in patrol boats, who have jurisdiction over tribal members. Cooperation with DOF patrol officers and County law enforcement has been excellent.

VIII

DOF would re-sign the Oyster Reserve boundaries. These boundaries had been surveyed and marked two years ago. (The markers had been vandalized by persons unknown.) Signs and floating buoys would caution people not to trespass on private lands. DOF maps and publications would clearly specify boat access only and show the boundaries. Signs near the site would specify boat access only.

No mechanical harvesting would be allowed. DOF is willing to limit digging to hand-held rakes, i.e., no shovels, to minimize impact to the site. The Department is also willing to limit harvesting hours to daylight, or require that night lights be shaded. (Some public razor clamming areas have been limited to daylight hours.)

IX

The site is accessible by boat during the high tide. The nearest boat launch is at Allyn, only 3/4 nautical miles to the southeast.²

² A nautical mile is 6,000 feet, or 1.1 miles.

1 This facility has parking for 20 cars with boat trailers, sanitary
2 facilities, fresh water, and trash containers. Further away is Fair
3 Harbor (3 1/2 n. miles), Vaughn Bay (4 1/4 n. miles), and Graham Point
4 (11 1/4 n. miles). All have parking.

5 In the past, the public has also accessed the North Bay public
6 tidelands by crossing Tacoma City Light powerline property (which is
7 south-east of the site). Occasionally, people have crossed vacant
8 private property. The nearest public road to the site is State Route
9 320. It is only two lanes and parking along its shoulder is
10 dangerous.

11 There is no land access or parking planned for this project.

12 X

13 The proposed graveling is in a "rural" environment as designated
14 in the Mason County Shoreline Master Program ("MCSMP").

15 There are private residences on the uplands to the east, at least
16 several hundred feet from the site, including a "bed and breakfast"
17 establishment. These were built after the Oyster Reserve was
18 established, primarily on 1/2 acre parcels. Some of the homes are
19 occupied full-time. To the east and south is undeveloped land.

20 Mason County has approved two other DOF graveling enhancement
21 projects, one at Annis Bay near a state park, and one at Oakland Bay
22 which is boat access only. Neither of these areas has residences
23 nearby.

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26 FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW - REVERSAL

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XI

With increased public use comes the normal inconveniences that private property owners experience when they live near public lands. We find, however, that the likely increases in impacts due to habitat enhancement are not likely to be substantial. Nor are they sufficient to outweigh the benefits to the public of enhancing the productivity and use of these public lands. DOF's agreement to conditions further minimizes any impact. Abutting owners and their guests will, of course, have close land access to the enhanced shellfish area.

XII

Any Conclusion of Law deemed to a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW³

I

The Shorelines Hearings Board has jurisdiction over the parties and the subject matter of the appeal. RCW 90.58.180. The Board analyzes cases de novo.

The Board does not have jurisdiction over Indian treaty rights. (Friends of the Earth v. Navy, SHB Nos. 87-31 and 33; Order Granting Partial Summary Judgment.)

³ Neither SHB Opinion is entitled to precedential legal effect, as neither has garnered a majority of Board. WEC v. Douglas County, SHB No. 86-34, at fn. 2.

1 Appellant has the burden of proof. RCW 90.58.140(7).

2 II

3 The Shorelines Hearings Board reviews a proposed development for
4 consistency with the Shorelines Management Act (Chapt. 90.58 RCW;
5 "SMA"), and the Mason County Shorelines Master Program ("MCSMP").

6 III

7 The MCSMP designates the area containing the site as a "rural
8 environment". The MCSMP states in pertinent part that:

9 The Rural Environment is intended for those areas
10 characterized by intensive agricultural and
11 recreational uses and those areas having a high
capability to support active agricultural practices and
intensive recreational development.

12 [. . .]

13 Public recreation facilities for public use which can
14 be located and designed to minimize conflicts with
agricultural activities are recommended for the Rural
15 Environmental. [. . .] In a similar fashion,
16 agricultural activities should be conducted in a manner
17 which will enhance the opportunities for shoreline
recreation. [. . .] MCSMP .08.18. Emphasis added.

18 IV

19 Mason County analyzed the project for a substantial development
20 permit under MCSMP uses: "aquaculture" and "recreation".

21 Aquaculture is defined in relevant part as:

22 the farming of lakes, streams, inlets and estuaries.
23 It refers to hatching, planting, feeding, raising and
24 harvesting of aquatic plants and animals, such as
[. . .] shellfish. MCSMP .16.020.

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26 FINAL FINDINGS OF FACT AND
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27 SHB No. 88-26

(11)

1 Recreation is defined in the MCSMP as:

2 the refreshment of body and mind through forms of play,
3 amusement or relaxation. The recreational experience
4 may be either an active one, involving boating,
5 swimming, fishing or hunting or passive, such as
6 enjoying natural beauty of a vista. MCSMP .16.220.

7 We conclude the project is properly analyzed under the MCSMP as
8 aquacultural and recreational uses.

9 V

10 We conclude that the project is a "water-dependent use" because
11 is is intrinsically dependent upon a water location. Yount v. Hayes,
12 SHB No. 108. Water-dependent uses are preferred uses in the shoreline
13 under the SMA (90.58.020) and in the MCSMP at .16.040.

14 VI

15 Respondents contend that the proposal has to be analyzed as
16 "commercial development use" under the MCSMP .16.040 because tribal
17 members may harvest clams in non-recreational quantities (i.e. more
18 than 2-3 pounds/person/day) for possible sale. Respondents further
19 contend that remand or reversal is therefore necessary, because the
20 County had not done such analysis. We conclude for several reasons
21 that these contentions are in error.

22 There is no specific definition of "commercial development" in
23 the Master Program Definitions Section at .08, so we look to MCSMP
24 .16.040 Commercial Development Use Regulations in the first instance.
25 The MCSMP use regulations clearly contemplate that there be a

1 commercial transaction on-site, such as would occur at marinas,
2 fueling facilities, and so forth, as enumerated in the MCSMP, with the
3 exchange of money. MCSMP .16.040. There is no evidence whatsoever in
4 this case that there will be any retail or wholesale transactions
5 on-site.

6 Furthermore, the dictionary definition of commercial is:

- 7 1. of or connected to commerce or trade
8 2. of or having to do with stores, office buildings, etc.
[commercial property]

9 New World Dictionary 2nd. College Edition. (Brackets in
the original.)

10
11 The MCSMP commercial development designation, as further illuminated
12 by the dictionary definition, also clearly contemplates that there be
13 a physical structure on-site for the commercial transaction. In
14 contrast, this proposal merely has the addition of gravel, anchor
15 rocks and some signs, i.e. no facility. Once the gravel/rocks are
16 placed, the operation is basically passive.

17 In sum, we conclude that the project is not a "commercial
18 development use" is that term is used in the MCSMP at .16.040.⁴

19 VII

20 Assuming that the project were to be a commercial development
21 use, we further conclude that the project as conditioned (see

22
23 ⁴ In so concluding, it is uncontested that the project is a
24 "development" as that procedural term is defined in the SMA at RCW
90.58.030(3)(d).

1 Conclusion of Law XI, below) meets all commercial development MCSMP
2 criteria at .16.040 for the rural environment. Water-dependent uses
3 are permitted outright, and shall be given priority and emphasis.
4 MCSMP .16.040.

5 Under the MCSMP, private developers of commercial development are
6 to be given priority when they serve the public and for uses which are
7 water dependent. Clearly then, a public project which has these same
8 features, is similarly favored.

9 There is no evidence that State or County health regulations are
10 violated. .16.040.A.3 and B. Access is only by water. Public safety
11 has been considered, with no access provided from State Route 320. ,
12 There is no parking provided near the water, complying with
13 .16.040.A.2 and B.

14 We find unpersuasive respondents' arguments that a remand or
15 reversal is necessary because the County has not analyzed the project
16 as a "commercial development use". No persuasive authority is cited
17 for this proposition. The Board held a quasi-judicial hearing with
18 all parties having ample opportunity to present evidence. Adopting
19 respondents' approach after a full hearing would encourage the
20 "ping-ponging" of shoreline cases between local government and the
21 Board and back again, without the advantages of final case
22 resolution. See, Knapp & Hammer v. Kitsap County, SHB Nos. 85-17 and
23 18. The SMA does not contemplate such result.
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26 FINAL FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW - REVERSAL

SHB No. 88-26

(14)

VIII

We conclude that any project changes including conditions since Mason County denied the shoreline permit application, are mitigation measures and are not of such a magnitude as to constitute substantial changes so as to require remand. See generally, WAC 173-14-064.

IX

The proposal to enhance hardshell clam habitat by graveling is consistent with the Shoreline Management Act, Chapt. 90.58 RCW. The improvement of hardshell clam habitat fosters a reasonable and appropriate use, and promotes and enhances the public interest. It preserves the public's opportunity to enjoy the physical and aesthetic qualities of the natural shorelines of the state. The use minimizes any resultant damage to the ecology and environment of the shoreline and does not interfere with the public's use of the water. RCW 90.58.020. To the contrary, it enhances their use.

X

We conclude that the project complies with the MCSMP goals and policies for the rural environment, with its emphasis on providing recreational opportunities compatible with agriculture. MCSMP .08.180.

XI

We conclude that the project, the SMA and the MCSMP and a shoreline substantial development permit should be GRANTED provided

the following conditions area added:

1. All gravel shall be transported to the site and off-loaded from barges. The gravel layers shall be no more than 2" thick to a maximum total of 8", with at least 3 months between gravel layer applications;
2. A one-acre test plot shall be established for one year, with no other areas within the five acres graveled during this period;.
3. The North Bay Oyster Reserve and the site boundaries shall be marked and there shall be signs stating that: only water access is allowed; digging for shellfish is only by hand-held rake; clamming is during daylight hours only; trespass on private property is prohibited; and depositing wastes (including bodily wastes) is prohibited.
4. DOF publications shall also state the above conditions and show the Reserve and site boundaries.

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XII

Any Finding of Fact deemed to be a Conclusion on Law is hereby adopted as such.

XIII

The DOF permit application, as conditioned at Conclusion of Law XI above, should be GRANTED.

The application should be REMANDED for issuance consistent with this Opinion.

DONE this 15th day of August, 1989.

SHORELINES HEARINGS BOARD

Juith A. Bendor
JUITH A. BENDOR, Presiding

Wick Dufford
WICK DUFFORD, Member

[See other Opinion]
HAROLD S. ZIMMERMAN, Member

[See other Opinion]
NANCY BURNETT, Member

[See other Opinion]
PAUL CYR, Member

Gordon F. Crandall
GORDON F. CRANDALL, Member